

Respondent.

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1. Francken was licensed as a peace officer. This license was valid at all times relevant to these findings.

2. On May 23 and 24, 2011, Francken was employed as a part-time peace officer with the City of Gallatin, Missouri.
3. On May 23, 2011, Francken received a report that minors were in possession of alcohol and that the minors had obtained the alcohol from Kyanna Merritt's trailer home. At that time, Merritt lived in the house of her uncle, Brian Rowe. Merritt's trailer home, where she previously had lived, was located next to Rowe's house.
4. Francken went to Rowe's house in order to interview Merritt and investigate the report.
5. Francken then searched Merritt's trailer for alcohol and found beer.
6. On May 24, 2011, at 6:00 PM, Francken went back to Rowe's house. Merritt was not present, and Francken asked Rowe to have Merritt call the police department.
7. Shortly thereafter, Merritt called the police department and spoke to Francken. During that call, Francken asked Merritt to come to the police station.
8. Eric Allnutt, Merritt's friend, drove Merritt to the police station. Allnutt waited outside while Merritt spoke with Francken.
9. At the police station, Francken took Merritt to a conference room and asked her about the beer found in her trailer home on the previous day. Francken also asked Merritt to make a written statement, which she refused.
10. After the meeting with Francken, Merritt told Allnutt that Francken exposed his genitals to her.
11. Approximately an hour after the meeting between Francken and Merritt, Merritt met with the Daviess County sheriff and provided a written statement alleging Francken exposed his genitals to her.

12. On November 17, 2011, a special prosecutor charged Francken with one count of sexual misconduct in the second degree, a Class B misdemeanor. The conduct alleged was that Francken exposed his genitals to Merritt on May 24, 2011.
13. On July 12, 2012, the special prosecutor dismissed the sexual misconduct charge and filed a new charge of second-degree trespass, an infraction.
14. On July 12, 2012, Francken pled guilty to one count of second-degree trespass. He was fined \$200.

Conclusions of Law

We have jurisdiction over this action.¹ The Director alleges that there is cause to discipline Francken's license under § 590.080.1(2) and (3):

The director shall have cause to discipline any peace officer licensee who:

(2) Has committed any criminal offense, whether or not a criminal charge has been filed;

(3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

The Director alleges that Francken is subject to discipline under subsection (2) by committing the offense of second-degree sexual misconduct and that he is subject to discipline under subsection (3) because he exposed his genitals to Merritt while on active duty as a police officer and that his actions involved moral turpitude. The Director does not allege there is a cause to discipline Francken's license based on the guilty plea to one count of second-degree trespass.

The Director has the burden of proof.² The Director must show, by a preponderance of the evidence, that Francken committed acts that are cause for discipline under subsections (2)

¹ Section 590.080.2. Statutory citations are to RSMo Supp. 2012 unless otherwise noted.

² *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012).

and (3).³ “‘Preponderance of the evidence’ is defined as that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.”⁴ “Plaintiff does not [satisfy the burden of proof by the preponderance of the evidence] by building up or merely creating an equipoise ... Even that would be insufficient; he must have a preponderance.”⁵

The factual issue in this case is whether Francken exposed his genitals to Merritt. Merritt testified that Francken exposed his genitals, and Francken testified that he did not. There were no witnesses to this alleged act other than Merritt and Francken. Thus, our credibility determination is crucial. We must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness.⁶ When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony.⁷

We find Francken to be a credible witness and find in favor of Francken on the facts. When both witnesses are equally credible, with no other corroborating evidence, the evidence is in equipoise. Evidence in equipoise cannot satisfy the preponderance of the evidence standard. Thus, the Director has failed to satisfy his burden of proof.

The Director’s first claim is that Francken committed the offense of second-degree sexual misconduct, which requires a showing that Francken “expose[d] his genitals under circumstances in which he knows that his conduct is likely to cause affront or alarm.”⁸ The Director has not

³ 375 S.W.3d at 229-30.1

⁴ *Id.*, quoting *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo.App. W.D.2000) (further citation omitted).

⁵ *Duggan v. Toombs-Fay Sash & Door Co.*, 66 S.W.2d 973, 976 (Mo.App. Spring.D. 1933).

⁶ *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992).

⁷ *Id.*

⁸ Section 566.093.1(1) (Cum.Supp. 2010). The statute also provides two other methods of committing second-degree sexual misconduct. Those methods, each involving a third person, do not apply here.

proven that Francken exposed his genitals to Merritt on May 24, 2011. Therefore, we do not find that Francken committed second-degree sexual misconduct. There is no cause for discipline under § 590.080.1(2).

The Director's second claim is that Francken "committed any act while on active duty or under color of law that involves moral turpitude." The "any act" alleged by the Director is that Francken exposed his genitals to Merritt. Again, the Director has not proven this. There is no cause for discipline under § 590.080.1(3)

Conclusion

We find no cause to discipline Francken's peace officer license.

SO ORDERED on August 29, 2013.

/s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner